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Supreme Court, U.S.

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No. 95-860

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

BARBARA SMILEY,
Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Respondent.

On Petition for a Writ of Certiorari
to the California Supreme Court

RESPONDENT'S MEMORANDUM IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question properly presented for review is the third question listed in the petition, which respondent would suggest rephrasing as follows:

Does the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, include late payment fees that are charged by a national bank on credit card accounts?

Petitioner's first two questions are not presented in this case: the California Supreme Court did not hold, and no party contends, that the South Dakota legislature has the power to define the term "interest" as used in section 85 of the National Bank Act. *See* discussion *infra* pp. 7-8.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Citibank (South Dakota), N.A. states that it is a wholly owned subsidiary of Citicorp Holdings, Inc., which is a wholly owned subsidiary of Citicorp. Citibank (South Dakota), N.A. has two wholly owned subsidiaries: CDC Holdings Inc. ("CDC Holdings") and CitiHousing, Inc. Citicorp Diners Club Inc. ("Diners Club") is a wholly owned subsidiary of CDC Holdings, and Diners' Colorado Realty Corp. is a wholly owned subsidiary of Diners Club.

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OPINIONS BELOW

The opinion of the California Supreme Court is reported as *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995) (Pet. App. 1-72). The depublished opinion of the Court of Appeal appears at *Smiley v. Citibank (South Dakota), N.A.*, 26 Cal. App. 4th 1767, 1770, 32 Cal. Rptr. 2d 562, 564, *review granted*, 35 Cal. Rptr. 2d 269 (Cal. 1994) (Pet. App. 74-98). The order and opinion of the trial court are not reported.

JURISDICTION

The California Supreme Court entered its judgment on September 1, 1995. The petition was filed and docketed on November 30, 1995. The jurisdiction of this Court is invoked under section 1257(a) of title 28.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is set out at pages 1-2 of the petition.

Section 85 of the National Bank Act, 12 U.S.C. § 85, is set out, in relevant part, at page 2 of the petition.

Section 86 of the National Bank Act, 12 U.S.C. § 86, is set out, in relevant part, at page 2 of the petition.

Section 54-3-1 of the South Dakota Codified Laws states as follows:

Interest is the compensation allowed by law for the use, or forbearance, or detention of money or its equivalent, including without limitation, points, loan origination fees, credit service or carrying charges, charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit. These charges do not include charges made by a third party.

S.D. Codified Laws Ann. § 54-3-1 (1990).

Section 54-1-1.1 of the South Dakota Codified Laws states, in relevant part, that:

Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no maximum interest rate or charge, or usury rate restriction between or among persons, corporations, estates, fiduciaries,

associations, or any other entities if they establish the interest rate or charge by written agreement.

S.D. Codified Laws Ann. § 54-1-1.1 (1990).

The California Civil Code provision that governs liquidated damages, Cal. Civ. Code § 1671, is set out at page 3 of the petition.

STATEMENT

A. INTRODUCTION

Respondent Citibank (South Dakota), N.A. ("Citibank") agrees with petitioner that the Court should grant a writ of certiorari to resolve a direct conflict between the highest courts of different states on an important question of federal law: whether the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees. The decision of the California Supreme Court (Mosk, J.) from which petitioner seeks review is consistent with recent decisions of the Colorado Supreme Court, *see Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 WL 696449 (Colo. Nov. 20, 1995), and the United States Court of Appeals for the First Circuit, *see Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993). Those decisions are also in harmony with the interpretation of section 85 on this point by the Office of the Comptroller of the Currency (the "OCC"), which charters and supervises national banks, including Citibank. A subsequent decision by the New Jersey Supreme Court, however, directly conflicts with this authority. *See Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94 (N.J. Nov. 28, 1995) (Pet. App. 151-224).

The question of federal law on which the California and New Jersey Supreme Courts disagree is very important. National banks lend hundreds of billions of dollars every

year on terms set in reliance on the authority conferred by section 85 to assess charges for the use or detention of their money. The national banks have relied on the established interpretation of that statute adopted by the California Supreme Court as well as the OCC. Uncertainty about the meaning of section 85 would "throw into confusion the complex system of modern interstate banking." *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 312 (1978). Moreover, very large amounts are at stake in the present case and other litigations pending around the country. Citibank therefore supports the petition insofar as it asks the Court to review the question stated above. In plenary briefing, Citibank will request that the Court affirm in its entirety the decision of the California Supreme Court.

B. BACKGROUND

Citibank is a national banking association chartered by the OCC, a unit of the Treasury Department. Citibank's only location is in Sioux Falls, South Dakota. From that location, Citibank issues Visa, Mastercard, and other credit cards to customers nationwide, extends credit pursuant to the agreements covering such cards, and collects the charges that cardholders have contracted to pay. (See Pet. App. 2). Citibank's credit card agreements generally provide for both "finance charges" on certain outstanding balances and "late payment charges" if a cardholder does not make a required minimum payment by a specified date. (*Id.*) The late payment charges are imposed in the form of both a flat fee and, in some instances, as a percentage of the borrower's account balance. (Pet. App. 40 n.17).

On July 7, 1992, petitioner filed her complaint as a purported class action in the Los Angeles Superior Court challenging Citibank's late payment charges. She alleged that she is a California resident and that Citibank had assessed late payment charges on her MasterCard and

Preferred Visa credit card accounts. (Pet. App. 109-10, 114-18). Such charges were consistent with the express terms of her card agreements with Citibank and are permitted under the law of South Dakota, Citibank's home state. Petitioner alleged, however, that such fees are impermissible under California law. (Pet. App. 114-18).

On August 5, 1992, Citibank removed the action, on grounds of the parties' diversity of citizenship, to the United States District Court for the Central District of California. On January 14, 1993, the District Court granted petitioner's motion to remand the matter to state court on the ground of lack of diversity.

C. HOW THE FEDERAL QUESTION WAS PRESENTED AND RESOLVED BELOW

Petitioner's claim was predicated entirely on her contention that late payment charges assessed by Citibank on credit card accounts of California residents violate section 1671 of the California Civil Code. On April 28, 1993, Citibank moved the Superior Court for a judgment on the pleadings dismissing all claims set forth in the Complaint. The basis for Citibank's motion was that, under section 85 of the National Bank Act, Citibank is authorized to charge the "interest" allowed to state-regulated lenders by its home state; that the term "interest" as used in section 85 includes credit card late payment charges; and that, as this Court held in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978), section 85 preempts any conflicting state law.

On July 6, 1993, the Superior Court denied Citibank's motion. On August 23, 1993, Citibank filed in the California Court of Appeal a Petition for Writ of Mandate. The Court of Appeal issued an alternative writ (commanding the trial court to grant Citibank's motion or, alternatively, to show cause why its decision should not be reversed) on

September 7, 1993. On September 14, 1993, the Superior Court entered a minute order granting Citibank's motion, and on October 6, 1993, the Superior Court entered an Order setting forth its findings and conclusions. (Pet. App. 8 n.2 & 99-105). On July 11, 1994, the Court of Appeal issued its opinion affirming the Superior Court's decision. (Pet. App. 74-98). On October 27, 1994, the California Supreme Court granted review, and on September 1, 1995, the California Supreme Court affirmed the judgment of the Court of Appeal. (Pet. App. 1-72).

The California Supreme Court began its analysis by recognizing that "[t]he issue is not the existence of preemption under section 85," because this Court held unanimously in *Marquette* that section 85 prescribes the interest that a national bank may charge on loans to a borrower who resides in another state and overrides any contrary law of the borrower's state. (Pet. App. 12-13). Thus, if a charge made by a national bank is "interest" within the meaning of section 85, any contrary law of the borrower's state "must, of course, give way to the federal statute." *Marquette*, 439 U.S. at 318 n.31.

The court then turned to the only issue before it: "the meaning that the term 'interest' bears within" section 85. (See Pet. App. 14). After noting that the term "interest" is not expressly defined in section 85, the court looked at the purpose of the Act, which is to ensure that the national bank has the same rights as the "most favored lender" within its home state. (See Pet. App. 15 (citing *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1873))). The court then concluded that the term "interest," as defined before, at, and after the 1864 enactment of the National Bank Act, "could include . . . a late payment fee, payable contingently in the event of default after maturity." (Pet. App. 18-20). Accordingly, the court held that section 85 empowers a national bank to collect such charges if

they are allowed to other lenders located in the bank's home state, and that the law of California is preempted to the extent it is to the contrary. (See Pet. App. 38-39).

ARGUMENT

A. THE SOLE QUESTION PRESENTED IS WHETHER "INTEREST," AS USED IN SECTION 85, INCLUDES CREDIT CARD LATE PAYMENT CHARGES.

The sole question properly presented for review in this case is whether "interest," as used in section 85, includes late payment fees on credit card accounts. If, as a matter of federal law, "interest" in section 85 includes such fees, then state law purporting to impose conflicting limits on national bank late payment fees is preempted. See *Marquette*, 399 U.S. at 308 & 318 n.31. This Court should grant the writ in this case to resolve the question, because, *first*, state supreme courts have now reached directly conflicting answers, and, *second*, the question is of great importance to national banks, their customers, and the banking system.

Petitioner has listed two other questions (questions 1 and 2 in the petition) that are not properly presented in this case. Contrary to the assumption in petitioner's first question, the California Supreme Court did not hold that the term "interest" in section 85 includes late payment charges by reasoning that the South Dakota legislature so defined it. Rather, the court expressly held that *federal* law provides the definition of "interest" as the term is used in section 85, and that Congress did not intend that the term "interest" be limited to periodic percentage charges. (Pet. App. 23).

Contrary to petitioner's second question presented and the assertions in her petition, the California Supreme Court did not hold that Congress delegated to South Dakota the power

to define "interest." In fact, the court specifically rejected that argument:

In part, Smiley asserts that the term "interest" in section 85 may not be construed to cover late payment fees, even if such fees are allowed by a national bank's home state. To do so, she claims, would compel a conclusion that Congress failed to define the word itself, but rather delegated the task to the several states in violation of section 1 of article I of the United States Constitution, which "vests" in it "[a]ll legislative Powers [t]herein granted." That is simply not the case. Congress has made no such delegation. As shown above, it has itself defined the word, impliedly if not expressly, to cover late payment fees, if such fees are allowed by a national bank's home state. True, it has adopted in this regard, as by a choice-of-law provision, the usury law of the national bank's home state as the rule governing all loans by the bank in question, even interstate loans, notwithstanding the law of any other state. It has thereby entrusted the question of the lawfulness of a national bank's late payment fees to its home state and to its home state alone. But it has not thereby made a delegation Here, we conclude that Congress did not delegate its legislative powers to the several states in section 85, in which it adopted for each national bank the usury law of the state in which such bank is located.

(Pet. App. 30).

B. THE INTERPRETATION OF SECTION 85 BY THE CALIFORNIA SUPREME COURT CONFLICTS WITH A SUBSEQUENT INTERPRETATION OF THAT FEDERAL STATUTE BY THE NEW JERSEY SUPREME COURT.

A principal purpose of this Court's certiorari jurisdiction is to resolve conflicts among state courts of last resort on important issues of federal law. *See Sup. Ct. R. 10(b)*. On November 28, 1995, the Supreme Court of New Jersey — the highest court in that state — issued a decision in *Sherman v. Citibank (South Dakota), N.A.*, (Pet. App. 151-224), that directly conflicts with the California Supreme Court's decision. The New Jersey court concluded "that late-payment fees are not 'interest' within the intendment and purposes of [the National Bank Act]." (*See Pet. App. 154*). The New Jersey case involved the same defendant and raised the same issue presented here, and respondent will shortly file a petition for a writ of certiorari seeking review of that decision.

The decision of the New Jersey Supreme Court also conflicts with the decision of the court of last resort in Colorado, *see Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 WL 696449, at *6 (Colo. Nov. 20, 1995) ("We conclude that the NBA's purpose and legislative history compel a finding that late payment fees are a form of 'interest' under section 85 of the National Bank Act."), and with the resolution of a similar federal question by the First Circuit, *see Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (holding that both section 85 and section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (codified at 12 U.S.C. § 1831d), the parallel federal statute governing state-chartered banks insured by the FDIC, preempted Massachusetts law prohibiting late charges).

Resolution of the federal issue raised by this case will also resolve or affect numerous cases pending in lower courts throughout the country. Other cases, similar to those referred to above, are pending (or have recently been decided by) federal and state courts in Alabama, California, Colorado, Minnesota, New Jersey, Pennsylvania, and Wisconsin.¹ Plaintiffs in these actions are seeking hundreds of millions of dollars in damages. Thus, this issue is of tremendous consequence in terms of the potential liability of banks throughout the nation.

C. THE PROPER INTERPRETATION OF SECTION 85 IS A QUESTION OF SUBSTANTIAL IMPORTANCE

Section 85 empowers a national bank to charge interest at any rate permitted by its home state to the most-favored state-regulated lender. *See Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1873); (Pet. App. 15-16). To ensure competitive equality between state and national banks, federal and state courts have traditionally interpreted the term "interest" in section 85 to encompass all charges for the use or forbearance of money, including late charges. (See Pet. App. 26-27). The term "interest" as

used in 1864 was (and remains) sufficiently broad to accomplish that congressional purpose. (See Pet. App. 18-25).

Moreover, the OCC has repeatedly concluded since 1955 that late fees are governed by section 85 (Pet. App. 27-28) (citing OCC rulings); *see Office of the Comptroller of the Currency, Interpretative Letter No. 670*, Julie L. Williams, Chief Counsel (Feb. 17, 1995), *reprinted in Fed. Banking L. Rep. ¶ 83,618*, 1995 WL 416305. Most recently, the OCC has proposed a formal interpretive rule codifying its definition of the term "interest" in section 85; the pending rule would state explicitly that late payment fees are "interest" within the meaning of section 85. See 60 Fed. Reg. 11924-11941 (1995) (to be codified at 12 C.F.R. 7.4001) (proposed March 3, 1995).

National banks, including Citibank, have relied on these long-standing judicial and administrative opinions in structuring their interstate lending programs, including their credit card programs. The conflict between the California and New Jersey interpretations of section 85 makes it impossible for a national bank (and, in particular, Citibank, the defendant in both cases) to determine what law governs the charges it may seek to collect in connection with these loans. The OCC emphasized this concern in its *amicus curiae* brief filed with the California Supreme Court in support of Citibank:

National banks, such as Defendant/Respondent in this action, have relied on the OCC's interpretation of Section 85 and have structured their lending programs to conform to these longstanding interpretations. Indeed, national banks lend millions of dollars of credit every day in reliance on the lending authority conferred by Section 85 and the laws of their home states. Section 85 provides national banks predictability about their lending operations by setting a uniform standard for determining the charges that may be assessed in

¹ See, e.g., *Hunter v. Rich's Dep't Store*, No. CV 95-PT-1548-S (N.D. Ala. Aug. 31, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted and opinion superseded by* 889 P.2d 540, 38 Cal. Rptr. 2d 346 (Cal. 1995), *review dismissed*, 1995 WL 707413 (Cal. Nov. 2, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 WL 696449 (Colo. Nov. 20, 1995); *Tikkanen v. Citibank (South Dakota), N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Mazaika v. Bank One Columbus, N.A.*, 653 A.2d 640 (Pa. Super. Ct. 1994), *allocator granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re Consolidated Credit Card Litigation*, 849 F. Supp. 1015 (W.D. Pa. 1994) (appeal pending); *Wisconsin v. Ameritech Corp.*, No. 92 CV 1013 (Wis. Cir. Ct. July 14, 1993).

connection with those activities. This predictability and uniformity is critical to interstate lending. If the permissible charges for a credit card transaction were determined with reference to the home state of the borrower, the flow of interstate lending would be severely undermined.

Brief of Amicus Curiae Comptroller of the Currency in Support of Respondent and Defendant at 2.²

National banks lend hundreds of billions of dollars a year in reliance on the lending authority conferred by section 85 and the laws of their home state. Uniformity and predictability in the governing law are critical to interstate lending. National banks simply cannot make loans on such a scale without knowing what law will govern their loan charges.

It is also important that this Court resolve the conflict so that state legislatures can determine their regulatory jurisdiction. Indeed, several states, including California and New Jersey, have recently enacted or amended laws governing credit card late fees against the backdrop of law established by section 85, the judicial interpretations of section 85, and the interpretations of that statute by the OCC. (See Pet. App. 7 n.2 (citing Cal. Fin. Code §§ 4000-4001 (Deering

²In addition, it is important for national banks to know that they can rely on the guidance of the OCC. The OCC is charged with the administration of the National Bank Act and has broad authority over the chartering, supervision, and regulation of almost every aspect of the affairs of banks organized under the National Bank Act, including the power to determine whether a bank's activity is permissible under the national banking laws. *See Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980). This Court has frequently held that the OCC's interpretation of the National Bank Act is entitled to judicial deference if that interpretation is based on a permissible construction of the statute. *NationsBank, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 816 (1995); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987).

Supp. 1995)); Pet. App. 176-177 (citing N.J.S.A. 17:16C-42(a))). It is therefore important that the question presented be resolved so that all the participants in interstate lending by national banks — the OCC, the state legislatures, the consumers, and the banks — can determine the applicable law.

Finally, the federal question presented is important because of the amounts at stake. Plaintiffs in the actions already pending are seeking hundreds of millions of dollars in damages. The significant impact on national banks of such claims is an additional reason for granting the writ.

CONCLUSION

For the foregoing reasons, Citibank supports the petition insofar as it requests that the Court issue a writ of certiorari to decide the question stated above.

Dated: December 18, 1995

Respectfully submitted,

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